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Robert S. Gerstein

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By ROBERT S. GERSTEIN*

Introduction

The right to privacy has received rich but fragmented treatment by the United States Supreme Court over the past twenty years. Founded not on a single constitutional provision but on various implications of and "emanations" from the Bill of Rights,[1] the right to privacy has yet to be interpreted in a comprehensive fashion.[2] Developments have taken one path in the field of search and seizure[3] and another in the realm of regulating private life.[4] As a result, protection in both spheres seems to be given or withheld for reasons that are neither principled nor predictable.[5] But the Supreme Court interpretations of the Federal Bill of Rights are not the only bases for developing our fundamental rights. Increasingly, state courts have found an alternative basis for developing the right to privacy[6] in their own state constitutions.[7] Cali-

* Professor of Political Science, University of California, Los Angeles; Member, California Bar. B.A., 1961, University of California, Los Angeles; LL.B., 1964, Harvard University; Ph.D., 1967, University of California, Los Angeles.

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1. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

2. As one commentator has written, "Privacy is a legal wall badly in need of mending." Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 234, 234 (1977). The critiques are many. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

3. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

4. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

5. *See, e.g.*, Smith v. Maryland, 442 U.S. 735 (1979); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976).

6. *See* Cope, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 671 (1977).

7. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

fornia is among those states that have an explicit constitutional right to privacy[8] and therefore need not rely on emanations as a basis for analysis. This gives the right a more secure foundation and a better chance to achieve coherence in California than it has had at the federal level.

California courts have given substantial attention to their right to privacy, and a gradually emerging coherence can now be discerned. This development continues to be hampered, however, by adherence to the conceptual division between search and seizure law on the one hand and the regulation of private life on the other, as well as by the continued dominance of the federally based "reasonable expectation of privacy" theory in the search and seizure realm. It is one of the principle contentions of this article that this theory is fundamentally misdirected and that it should be replaced by a unified approach which would give California the basis for the protecting private life from *both* unreasonable searches and seizures and unjustified regulations.

Part I of this article subjects the prevailing doctrine of privacy, as embodied in the reasonable expectation theory, to critical analysis. Part II outlines the process by which the California courts have paved the way for a break with the reasonable expectation theory through their independent development of the values that underlie the right of privacy. Next, two cases, *People v. Maxie*[9] and *De Lancie v. Superior Court*,[10] in which California courts have taken a major step toward rejecting the reasonable expectation approach, are discussed. These

8. CAL. CONST., art. I, § 1 provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

9. 165 Cal. Rptr. 4 (Ct. App. 1980), *hearing granted*, Crim. No. 21556 (Sup. Ct. July 16, 1980). [Editor's note: As of publication *People v. Maxie* had not been officially set for argument].

Where the California Supreme Court grants a hearing after decision by the state district court of appeal, the cause is removed in its entirety from the court of appeal and the decision and opinion of the court of appeal are rendered a nullity, without force as precedent or as an authoritative statement of the law. Ponce v. Marr, 47 Cal. 2d 159, 161, 301 P.2d 837, 839 (1956). The court of appeal decision is not, therefore, reprinted in the California Official Reports, and for that reason, may be found only in the unofficial *West's California Reporter*.

After hearing has been granted by the California Supreme Court a tentative date is set for argument. Following argument the cause is submitted by the court. The court must file its opinion within ninety days of submission. CAL. CONST. art VI, § 19 ("[a] judge may not receive [his or her judicial salary] while any cause before the judge remains pending . . . for 90 days after it has been submitted for decision"). Once filed, a decision by the court becomes final within thirty days absent an extension of time for filing for a rehearing or the grant of a rehearing. *See* CAL. R. CT. 24.

10. 159 Cal. Rptr. 20 (Ct. App. 1979), *hearing granted*, S.F. No. 24095 (Sup. Ct. Nov. 29, 1979), *argument*, (Sup. Ct. Aug. 5, 1981). [Editor's note: As of publication *De Lancie* had

cases, which uphold the privacy of visits to pretrial detainees on the basis of California's constitutional right to privacy, point the way to further clarification of the special character of values that the right of privacy is to protect. Part III offers a proposal for a unified theory of the right to privacy, a proposal which seems very much in harmony with the California development, and explains how that theory provides a foundation for the decisions made in *Maxie* and *DeLancie* on the privacy of pretrial detainees.

I. The Right to Privacy and the Supreme Court

The United States Supreme Court has developed no single coherent theory of privacy. In the tradition of Dean Prosser's famous article,[11] it has taken on privacy issues piecemeal, dealing with each without reference to the others. Publication of private matters by the press has received the least attention, having been relegated to little more than a footnote in the doctrine of libel under the First Amendment.[12] In contrast, both governmental intrusions into private areas and governmental regulation of private life have received substantial development. Except for a critical connection in an early case involving the regulation of private life,[13] however, the law in these two areas has evolved separately. Though theoretically sparse, the regulation cases have developed a concern for the substance of those aspects of life that are regarded as private. The intrusion cases, on the other hand, have been dominated by a theory that is the center of interest here: the reasonable expectation of privacy. What follows is a consideration and critique of the reasonable expectation theory, followed by a brief summary of the developments in the regulation field. The contention is that the division of the field and the consequent failure to take a coherent view of the privacy right have led to a fragmented and unsatisfying theory of privacy.

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not been submitted]. *See* note 9 *supra*, concerning the effect of the California Supreme Court granting a hearing.

11. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

12. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Time, Inc. v. Hill, 385 U.S. 374 (1967).

13. Justice Douglas, in Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965), suggested that the right of married couples to use contraceptives was founded in the penumbra formed by emanations from the Fourth Amendment, among others, and further implied that the right rests in part upon the fact that to "allow the police to search the sacred precincts of the marital bedroom" to enforce a prohibition of contraceptive use would be "repulsive to the notions of privacy surrounding the marriage relationship."

A. The Reasonable Expectation Theory

1. Origins of the Reasonable Expectation Theory

The reasonable expectation theory originated in *Katz v. United States*[14] as an effort to expand the protection of the Fourth Amendment beyond the traditional limits of property rights. Katz had no property right in the telephone booth from which he placed bets, yet a majority of the Court was convinced that the tapping of these calls constituted a search under the Fourth Amendment. The Court found that Katz, by going into the telephone booth and closing the door, made an effort to keep what he said private. The majority, through Justice Stewart, reasoned that because what is intentionally made public, even inside the home, is not protected, it follows that what is sought to be kept private, even outside the home, is protected.[15] Justice Stewart concluded that one who went into a telephone booth was "entitled to assume" that his words would be for the person at the other end of the line alone; to "read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."[16] Justice Harlan, in his well-known concurrence, translated this point into the language of reasonable expectation. He stated that the theory that emerges from the case requires a subjective expectation of privacy that "society is prepared to accept as 'reasonable.' "[17]

Justice Harlan's idea of reasonableness is relatively straightforward: a common sense understanding of the precautions needed to keep things quiet.[18] For instance, one should stay in one's house, go into a telephone booth, not leave things out in an open field,[19] nor talk in the presence of people who are not entirely trustworthy.[20] The language of reasonable expectation is interchanged easily with the language of assumption of risk.[21] The question is whether or not one who acts in a particular way assumes the risk that others will discover what he wants to keep private. For example, the Court held in *United States v. White*[22] that one contemplating illegal activities undertakes the risk that her conversations with her companions might be reported to the

14. 389 U.S. 347 (1967). For a discussion of the pre-*Katz* rule, see notes 25-28 and accompanying text *infra*.
15. *Id.* at 351-52.
16. *Id.* at 352.
17. *Id.* at 361 (Harlan, J., concurring).
18. *Id.*
19. *Id. Accord* Hester v. United States, 265 U.S. 57 (1924).
20. *See, e.g.*, United States v. White, 401 U.S. 745 (1971).
21. *See* RESTATEMENT (SECOND) OF AGENCY §§ 496A-496D (1958).
22. 401 U.S. 745 (1971).

authorities.[23] That she does not realize she is taking the risk is a failure of perception, from which she does not deserve protection.

The reasonable expectations theory has become a general theory of the Fourth Amendment, perhaps of privacy in general, and is founded on the idea that the Amendment protects the expectations of sensible people who take reasonable precautions to keep things to themselves. The infringement of the right to privacy means, then, the disappointment of these expectations. The evil is understood to be the distress occasioned by the disappointment, a distress which will vary among individual cases depending on the extent of the expectation and its particular significance to the individual holding it. If there is no expectation, there is, quite obviously, no pain occasioned by its disappointment. Conversely, if the precautions taken are not sufficient to justify a sensible person's formation of an expectation of privacy, then the distress does not deserve legal recognition.[24]

What is missing from this analysis is any concern with the special qualities of *privacy*. After all, expectations not involving privacy, such as the expectation interest of the promisee in a contractual relationship are, if disappointed, likely to cause people pain. The substance of privacy is ignored in favor of a consideration of the pain occasioned by disappointment. The historical purpose of the reasonable expectation approach was to escape the strictures of formalistic property analysis and to affirm that the Fourth Amendment "protects people, not places."[25] The path the Court took in doing this was to assume that houses are protected from invasion because and to the extent that they generate a reasonable expectation of privacy, and then to generalize

23. *Id.* at 752.

24. The language used by the courts in a number of cases supports this view: "[T]he teaching of Katz v. United States . . . . [is] that the interest protected by the Fourth Amendment is reasonable expectation of privacy." United States v. Vilhotti, 323 F. Supp. 425, 431 (S.D.N.Y.) (citations omitted), *aff'd in part and rev'd in part*, 452 F.2d 1186 (2d Cir. 1971); "De Forte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in De Forte's custody." Mancusi v. De Forte, 392 U.S. 364, 369 (1968); "If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversation . . . ." United States v. White, 401 U.S. 745, 751 (1971); "[T]he Fourth Amendment . . . protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 7 (1977).

25. Katz v. United States, 389 U.S. at 351.

this protection, extending it wherever people have a reasonable expectation of privacy.[26]

This approach errs in its basic assumption. It is not true that houses are protected from invasion only because and to the extent that they create a reasonable expectation of privacy. They are protected because of the value of what happens inside them: They are the seat of private life. To mistake expectations for the substance of the privacy values that the Fourth Amendment has traditionally protected is to continue making the error which the Court in *Katz* believed its predecessors had made by maintaining the technicalities of property ownership as the limits of Fourth Amendment protection—to mistake the outer shell for the substance within.

Thus, the error in the earlier approach has not been corrected but generalized. *Katz* is an improvement over *Olmstead v. United States*[27] and even *Silverman v. United States*,[28] both of which required the physical presence of electronic surveillance on a suspect's property before finding a search. The improvement, however, was made in a way that continues to mislead us about the values which are really to be protected and to dilute the broad protection the Fourth Amendment offers.

2. *Liberating the Negative Implications of the Reasonable Expectation Theory*

It has taken some time, but Justice Black's dire warnings that the use of the privacy formula would lead one day to a dilution of Fourth Amendment protection[29] have turned out to be accurate. In a recent series of cases beginning with *Rakas v. Illinois*[30] and culminating in *Rawlings v. Kentucky*,[31] the Supreme Court firmly has taken the view that Fourth Amendment rights begin and end with individual expectations of privacy.

The negative effect of the reasonable expectation theory was delayed by *Jones v. United States*,[32] in which the Court took a relatively generous approach to the requirement that a defendant be "aggrieved" by the unreasonable search and seizure before he can exclude

26. *Id.*

27. 277 U.S. 438 (1928) (wiretap not a search because it did not involve a trespass to property).

28. 365 U.S. 505 (1961) (electronic eavesdropping held to be a search because it involved the use of a "spike mike" which made contact with the heating duct in the suspect's house when driven through a party wall).

29. Katz v. United States, 389 U.S. at 364-74 (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. at 507-27 (Black, J., dissenting).

30. 439 U.S. 128 (1978).

31. 448 U.S. 98 (1980).

32. 362 U.S. 257 (1960).

the fruits of it from evidence.[33] *Jones* involved the search for and seizure of drugs from an apartment in which Jones had been only a visitor for the night.[34] The Supreme Court held that Jones had standing to move to suppress the evidence. First, he had automatic standing simply because he was charged with the act of possessing the seized material; to hold otherwise would compel him to admit guilt by asserting a possessory interest in the drugs in order to argue for their exclusion.[35] Second, Jones' status as a guest did not bar him from contesting the search because "anyone legitimately on premises where a search occurs may challenge its legality."[36] Under this approach, there would be no need to make a minute examination of the privacy expectations of people in a private home because any of them could assert the interests of any other, including the owner, in contesting a search. This broad reading of the aggrievement requirement kept the reasonable expectation theory's negative implications, its potential for narrowing the scope of privacy, from surfacing for some time.

The dismantling of the *Jones* doctrine began in *Rakas v. Illinois*.[37] First, the Court held that a separate consideration of standing should be dispensed with, so that the sole question is "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it."[38] Second, the Court held that the question of whether one's Fourth Amendment rights are violated by a search of a place is not to be determined in accordance with *Jones*, by determining whether the criminal defendant was "legitimately" on the premises, but rather by determining whether or not she has "a legitimate expectation of privacy in the invaded place."[39]

In *Rakas* the passengers of a car asserted the right to exclude objects found in a search under the car seat and into its glove compartment.[40] The Court held that the passengers had no reasonable expectation of privacy in these places and therefore could not move to

33. Notwithstanding the generous reading in *Jones*, this requirement restricts the use of the exclusionary rule much more than, for example, California's approach, which allows the defendant to argue for exclusion even if he was in no way injured by the search and seizure itself. *See, e.g.*, Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

34. 362 U.S. at 258-59.

35. *Id.* at 263.

36. *Id.* at 267.

37. 439 U.S. 128 (1978).

38. *Id.* at 140.

39. *Id.* at 143.

40. *Id.* at 129.

exclude the objects found there.[41] The Court made it clear that its reasoning would apply not only to car searches but also to house searches. For example, a casual visitor would have no reasonable expectation of privacy in a basement he had not entered, and therefore could not contest the use of evidence found there.[42]

The work of *Rakas* was completed in the 1980 companion cases of *United States v. Salvucci*[43] and *Rawlings v. Kentucky*.[44] In *Salvucci*, the defendant was charged with possession of stolen mail that was seized in his mother's apartment. Although Salvucci would have had "automatic" standing under *Jones*,[45] the Court rejected this automatic standing rule because of the impact of *Simmons v. United States*.[46] In that case the Court held that a defendant's testimony at a suppression hearing may not be used against him at trial.[47] *Simmons* eliminated the jeopardy faced by one charged with possession who would argue for suppression. According to the Court in *Salvucci*, this reasoning eliminated the need for automatic standing.[48] The issue of standing became once again a question of whether the defendant had a reasonable expectation of privacy in the searched areas. The crucial point in the Court's reasoning was that the assumption that the mail was in the defendant's legal possession at the time of the search did not in itself establish any reasonable expectation of privacy.[49] Thus, after *Salvucci*, it is possible to search for an object even in someone's possession without violating his privacy right.[50]

In *Rawlings* this reasoning was taken a step farther. Even if the defendant asserts *ownership* of the object seized, she cannot challenge the legality of the search unless it violated her reasonable expectation of privacy.[51] Rawlings put his bottles containing LSD and other drugs into a purse belonging to Vanessa Cox shortly before the police arrived to search the house.[52] The Court found that because another friend had free access to the purse, because of the "precipitous nature" of the

41. *Id.* at 148-49.
42. *Id.* at 148.
43. 448 U.S. 83 (1980).
44. 448 U.S. 98 (1980).
45. 448 U.S. at 83-84.
46. 390 U.S. 377 (1968).
47. *Id.* at 394.
48. 448 U.S. at 84-85.
49. The Court remanded the case so that the trial court could consider whether or not the defendants had a legitimate expectation of privacy in the area of the home where the goods were seized. *Id.* at 95.
50. *Id.* at 97.
51. 448 U.S. at 104-05.
52. *Id.* at 101.

transfer, and because of the "frank admission by the defendant that he had no subjective expectation that Cox's purse would remain free from governmental intrusion," the defendant had no reasonable expectation of privacy.[53]

Elaborate rules of standing generally restrict a litigant's access to the means of vindicating her rights. The rules established in *Jones*, however, maintained older property concepts of Fourth Amendment law for the purpose of broadening the ambit of its protection. Now that these property concepts have been removed, nothing remains as a basis for the Fourth Amendment right but the bare expectation of privacy by the individual who claims that her rights have been violated.

3. Consequences of the Reasonable Expectation Theory

A theory that deals merely with the extent of the expectations generated by sensible, or less than sensible, precautions cannot possibly embrace all that is significant about invasions of privacy. The heart of the evaluative issues raised by the assertion that privacy has been invaded is not addressed by a theory that is based on the reasonableness of the efforts used to keep something private; as a result, the law of privacy has been significantly distorted.

The decisions concerning search and surveillance of prisoners[54] exemplify the flaws in the reasonable expectation theory. The application of this model compels the conclusion that privacy is not violated because no sensible detainee would have any reasonable expectation of privacy. Detainees ought to realize that surveillance is "the order of the day" in jail.[55] The problem with this analysis is that it can be seen to prove too much. If privacy is not violated where surveillance is the order of the day, then the government can eliminate the problem of invading privacy rights by making surveillance of the general population the order of the day. There is no disappointment of the expectation of privacy when the government makes it clear that there is no privacy to respect.[56]

The Supreme Court has conceded the fallacy of the reasonable expectation theory if taken to this extreme. In *Smith v. Maryland*,[57] for

53. *Id.* at 105.

54. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Lanza v. New York, 370 U.S. 139 (1962). For the earlier California decisions on this subject, see the cases cited in note 172 *infra*.

55. Lanza v. New York, 370 U.S. 139, 143 (1962).

56. The point was forcefully made by Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

57. 442 U.S. 735 (1979).

example, the Court held that the monitoring of the numbers dialed from Smith's home was not an invasion of his privacy, the Court, in a footnote, recognized that situations can be "imagined" in which the standard reasonable expectation approach would be inadequate.[58] These are situations in which actual expectations have been "conditioned" by "influences alien to well-recognized Fourth Amendment freedoms," for example, a nationwide announcement of warrantless entries or hapless refugees from repression who expect their phones to be tapped.[59] Even in these situations, however, the expectation is not to be entirely abandoned; rather, it is suggested that a "normative inquiry" would have to be made to see whether or not a reasonable expectation exists.[60]

That the problem is not merely one of the Supreme Court's imagined "1984" horrors can be seen from the more commonplace example of *Rawlings v. Kentucky*.[61] The Court found that Rawlings did not have a reasonable expectation of privacy because of testimony that he did not think that the pills he put into an acquaintance's purse would be safe from the police.[62] But why did he think this? If it was because he believed that the law would not protect them, then we have the oddity of an individual's uninformed view of the law being applied to him *as* law. If, on the other hand, he believed that the pills would be protected by law from police search, but assumed that the police would not obey the law, we have the equally ironic situation of a man being denied the protection of the law just because he doubted its efficacy. While it is clear that the Court did not feel that it had to make a "normative" inquiry to determine whether or not Rawlings' expectations were "conditioned" by alien influences, it is not apparent why his case is any different from that of the paranoiac refugee.[63]

58. *Id.* at 740 n.5.

59. *Id.*

60. *Id.*

61. 448 U.S. 98.

62. *Id.* at 104 n.3.

63. The possibility of "alien influence" having affected the law of a sister state also was not considered by the California Supreme Court in People v. Blair, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979). The court held that because the seizure of records of telephone calls made in Philadelphia were legal under the laws of that state, there was no reasonable expectation of privacy to be violated and therefore the records were admissible in California even though such a seizure would have been illegal if made in California. *Id.* at 656, 602 P.2d at 748, 159 Cal. Rptr. at 828. Thus, the measure of a reasonable expectation, and therefore, the right to privacy, is the law prevailing at the time and place of the purported invasion of the right to privacy. For a further discussion of *Blair*, see notes 162-64 and accompanying text *infra*.

Justice Harlan, the author of the reasonable expectation theory, has also acknowledged the difficulty with its wholesale application. In his dissent in *United States v. White*,[64] Harlan condemned such application, arguing that because "it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society."[65] Something more must be added to the theory to make it work satisfactorily.

The most natural response to the complaint that something is missing from the reasonable expectation theory is to import some element of evaluation into the concept of "reasonableness" itself and thereby turn it into a concept of legitimacy.[66] The addition of this element, however, can be used more readily to narrow privacy protection than to expand it. Indeed, there must be some element of legitimacy to limit the ambit of privacy expectations to be given protection. Not all disappointed expectations are deserving of redress, even if reasonable precautions have been taken.

The Court in *Rakas v. Illinois*[67] gave the example of the burglar in a summer cabin during the off-season: he has certainly taken sufficient precautions to be reasonably sure that he will not be detected, but it is clear that his expectation of privacy should not be protected.[68] The Court's insistence that the expectation must be legitimate in order to be reasonable solves this problem,[69] but the solution causes other conceptual difficulties. If the perspective is one of subjective expectation, then there must be another way of excluding a careful burglar, and others like him, such as the rapist in a distant wilderness area. Were it not for this theory, the question of legitimacy would never arise because no one would have thought such people had any claim of privacy in the first place.

That this legitimacy approach destroys the very basis of the right to privacy should become immediately apparent. Traditional privacy analysis deemed certain places to be private, and then protected from surveillance whatever went on in them, unless the authorities had good reason to believe that the activity was criminal. The legitimacy approach reverses the process. It asks whether or not it was legitimate from the actor's point of view to expect privacy for this activity, and if not, then surveillance is allowed even if the authorities have no good

64. 401 U.S. 745 (1971).
65. 401 U.S. at 786 (Harlan, J., dissenting).
66. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1(d) (1978).
67. 439 U.S. 128 (1978).
68. *Id.* at 143 n.12.
69. *Id.*

basis for believing it criminal.[70] Taken to its limits, this approach would have denied a reasonable expectation in *Katz* itself. Katz, after all, knew that what he was doing was not legitimate; should any attention be given to his expectation of privacy, no matter what precautions he took?

The Supreme Court has not taken the legitimacy concept this far, but it has at times come close, particularly in those cases in which conversations are reported by undercover agents or transmitted by one of the parties to them. For example, in *Hoffa v. United States*,[71] Hoffa and others were convicted of jury tampering on the basis of the testimony of Edward Partin, a government undercover agent in the Hoffa camp. The Court held that Hoffa's Fourth Amendment rights were not violated because he was not relying on the security of his hotel room, but on "his misplaced confidence that Partin would not reveal his wrongdoing."[72] Another example is *United States v. White*.[73] A government informant concealed a radio transmitter on his person and transmitted his conversations with White to other government agents. Again, the testimony of the agents was held admissible. The Court in these cases focused on the fact that the conversations had a criminal content and therefore, those involved in them could not legitimately expect that the conversations would remain private. Because the person involved knew that what he was doing was wrong, the government agents did not need to have any objective reason to believe the conduct was illegal in order to put him under surveillance.[74] To this extent, the standard Fourth Amendment probable cause doctrine is abandoned, provided, at least, that the people the police are after turn out to be villains. Application of this doctrine finds protectable privacy interests only for those who know themselves to be deserving and therefore allows our after-the-fact knowledge that the object of a search is a wrongdoer to influence our judgment of the legitimacy of the search. A right to privacy that protects only actions deserving of protection and that fails to establish a realm of general security within which people, deserving or not, can feel safe from intrusion unless the authorities have some objectively established justification for intrusion, is no right to privacy at all.

The legitimacy approach, at its worst, allows the reasonable expectation idea to become a vehicle for popular hostility to the "criminal

70. *See, e.g.*, United States v. White, 401 U.S. 745, 752 (1971).

71. 385 U.S. 293 (1966).

72. *Id.* at 302.

73. 401 U.S. 745 (1971).

74. *See* Hoffa v. United States, 385 U.S. at 302; United States v. White, 401 U.S. at 752.

element." This is evident in two California cases, *People v. Todd*[75] and *People v. Newton*.[76] Both involved electronic eavesdropping on conversations between arrested suspects in police cars. The appellate courts ruled no violation of privacy because, in the words of the *Todd* opinion: "[W]e do not believe society is prepared to recognize his expectation of privacy to have been reasonable. Nor did the trial judge, who noted it was unlikely for defendant to have concluded he was being placed in the police car for a sight-seeing tour of the city."[77] It is apparent that the judges' attitudes were influenced by the fact that the monitored conversations clearly established the guilt of the participants. The courts were not reflecting the societal expectation as to whether police cars are electronically bugged, but the societal attitude toward wrongdoers. The tone suggests the most dangerous possibility in the reasonable expectation concept: Judges may feel it appropriate to import their own perceptions of popular prejudice in their decisions.

The plausibility of turning to conventional morality as a standard is founded on the role that community mores play in shaping the right to privacy. It is the shared understandings of the community that establish the conventions by which it is understood just when others are invited into our lives and when they are not.[78] In our society, it is understood that a closed door will not be opened by others and that a backyard will not be entered without permission, but this is hardly universal. These are certainly matters that are culturally determined.[79] It is one thing, however, to say that the boundaries of the private realm are culturally determined and quite another to say that conventional moral judgments of particular activities or people will determine whether or not they have a right to privacy. Whatever the boundaries of the private sphere, it is crucial that it provide a secure place from which the demands of convention can be excluded.

What is finally obvious is that the reasonable expectation formula is indeterminate enough to allow for the consideration of a whole range of factors, which are frequently dealt with in an arbitrary or at least subjective manner. Consideration of societal attitudes and "shared ex-

75. 26 Cal. App. 3d 15, 102 Cal. Rptr. 539 (1972).

76. 42 Cal. App. 3d 292, 116 Cal. Rptr. 590 (1974).

77. 26 Cal. App. 3d at 17, 102 Cal. Rptr. at 541.

78. *See* Note, *The Concept of Privacy and the Fourth Amendment*, 6 MICH. J.L. REFORM 154, 178-80 (1972).

79. For some sense of the rich diversity in approaches to the maintenance of privacy, see Roberts & Gregor, *Privacy: A Cultural View*, in NOMOS XIII: PRIVACY (J. Chapman & J. Pennock eds. 1971) [hereinafter cited as NOMOS].

perience"[80] as the basis for decisionmaking can lead to very casual reasoning. For example, the Court in *Cardwell v. Lewis*[81] found that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." But what does transportation have to do with privacy? Many cars serve as a repository of personal effects. Certainly the privacy expectation in a car may be different from the one in a home, but the degree of difference depends on the particular car. What makes privacy expectations less in a car is the awareness that cars are more vulnerable to a police stop and search.[82] To take this into account for determining a privacy expectation, however, is again to make the law of privacy reflexive and thereby to place it at the mercy of law enforcement practices.

The *Cardwell* language that gives the car less protection because it is not a "repository of personal effects" gave rise to a whole realm of law distinguishing between the container which is a common repository for one's personal effects and the container which is not. The distinction was supposedly founded on the search for reasonable expectations of privacy, the premise being that a common repository of personal effects is inevitably associated with the expectation of privacy. But the particular discrimination made—between the tote bag on the one hand, and the shopping bag on the other—is artificial in the extreme.[83]

Bringing other values into the judgment of reasonableness of expectation can be used to expand as well as contract protection. This is the approach of Professor La Fave, who, building on Professor Amsterdam's theory, interprets the judgment of reasonableness as a "value judgment" requiring an assessment of whether or not allowing the police practice in question would diminish " 'the amount of privacy and freedom remaining . . . to a compass inconsistent with the aims of a free and open society.' "[84] To bring this test within the structure of the

80. *See* Rakas v. Illinois, 439 U.S. at 155 (Powell, J. concurring).

81. 417 U.S. 583, 590 (1974).

82. It was to this awareness that Justice Powell's phrase "shared experience" referred. Rakas v. Illinois, 439 U.S. at 155 (Powell, J., concurring). *See* text accompanying note 80 *supra*.

83. The California cases making this tenuous distinction are collected in People v. Halvorsen, 119 Cal. App. 3d 937, 174 Cal. Rptr. 261 (1981) (rejecting the claim of privacy for a cloth bag with "Bank of America" imprinted on it). Such distinctions were disapproved in the Supreme Court's plurality opinion in Robbins v. California, 101 S. Ct. 2841, 2845-46 (1981) (Stewart, J.).

84. 1 W. LAFAVE, *supra* note 66, at § 2.1(d) (quoting Amsterdam, *supra* note 66, at 403). While Amsterdam seems to envision the value judgment as an alternative to the "reasonable expectation," LaFave makes it clear that the value judgment is to be incorporated into the

Katz test is to produce a hybrid both awkward and unnecessary. It is awkward because the normative test requires protection even in the absence of any subjective expectation of privacy. Only an existing expectation, however, can be reasonable or unreasonable. It is unnecessary because if "reasonable expectation" means an "expectation that a person ought to be able to form, whether he has or not,"[85] then the whole structure of reasonable expectation becomes expendable. There is no greater clarity to be gained in "having the right to have certain expectations of privacy" than in "having the right to privacy." Indeed, there is less clarity. What is needed is not a new way of dealing with the value in reasonable expectations of privacy, but a new value: the distinctive value of *privacy* as such. To argue that this is an exercise in question-begging[86] is only to assert that the exercise points to the new value rather than elucidating it. To continue using the language of reasonable expectation, even with this addition, is to continue obscuring the distinctive character of privacy values, and to risk further dilution of their protection by those courts that continue to adhere to other concepts of reasonableness.

The uncertainty created by the susceptibility of the reasonable expectation theory to a great range of criteria, particularly to popular prejudice, creates problems that are acute in dealing with the right to privacy. Having some aspects of social life generally secure from social censure is critical to the existence of private life, and it is the role of the law to protect this security. To the extent that the law of privacy is uncertain, it does not maintain this security and causes activity which may attract social censure to be particularly vulnerable. As a result, private life is diminished.

The contemporary development of the reasonable expectation theory has made Justice Black's expressions of doubt over the development of the right to privacy[87] seem prophetic. Where property once offered a narrow, but at least secure, haven for private life, there is now no firm haven at all.

B. Government Regulation of Private Life

The second major approach to privacy by the United States Supreme Court arises from the newly developed area of protection of

process of deciding which expectations are reasonable. *See* 1 W. LAFAVE, *supra* note 66, at § 2.7(c).

85. *See* Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 MICH. L. REV. 154, 155-56 (1977).

86. *See* 1 W. LAFAVE, *supra* note 66, at § 2.1(d).

87. *See* note 29 and accompanying text *supra*.

private matters from governmental regulation. What follows is a survey of the major opinions in this area that suggests differences from, and affinities with, the approach taken by the reasonable expectation theory. This section concludes that neither theory satisfactorily treats the privacy right.

The second approach has its roots in *Griswold v. Connecticut*,[88] which held that marital sexual conduct is protected by the privacy right and can be regulated only when necessary to promote a compelling state interest. The reasoning of the four opinions written by the *Griswold* majority does have significant affinities with the reasonable expectation approach. These opinions emphasize the fact that the government has fostered and supported the marital relationship and has therefore raised expectations that it will be free from interference;[89] and suggest that privacy will be protected only in those relationships that are approved by conventional morality.[90] These opinions also suggest that married couples cannot be forbidden from using contraceptives because a search for the evidence of use would be unacceptable.[91] What distinguishes this approach from the reasonable expectation theory, however, is the emphasis on the substantive importance of the activity that the state purports to regulate: the significance that the sexual relationship has to a married couple justifies special protection. The nature of this specialness is assumed rather than argued for, but the intimacy, enduring quality, and sacredness of the relationship are accorded due respect.[92]

Eisenstadt v. Baird,[93] on the other hand, involved the regulation of contraceptive use by unmarried couples. Because the marital relationship was not present, there was no government fostered reasonable expectation of privacy. The focus in *Eisenstadt* necessarily became the substantive value of the choices being regulated, the significance of which was again asserted rather than argued. The opinion framed the question of the privacy right as the question: "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision

88. 381 U.S. 479 (1965). For further development of the constitutional significance of the marital relationship, see Zablocki v. Redhail, 434 U.S. 374 (1978).

89. 381 U.S. at 499 (quoting Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

90. 381 U.S. at 498-99.

91. *Id.* at 485-86.

92. *Id.* at 486, 495.

93. 405 U.S. 438 (1972).

whether to bear or beget a child."[94] Just why this is so is not made clear. The whole weight of the answer is borne by the phrase "so fundamentally affecting a person," but we are left to ponder whether this refers only to the degree of the effect or to its quality, and if to the latter, then just what it is about that quality which makes it fundamental.

In *Stanley v. Georgia*,[95] which involved the possession of obscene films at home for private use, the Court again concerned itself with the substantive significance of the privacy of the home: "[T]he right to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home."[96] The privacy of the home is to be protected because it offers the individual a shelter within which she can make choices as to what she will watch or read free from the moral censorship of the community around her.

In *Roe v. Wade*,[97] which brought abortion within the protection of the right to privacy, the analysis was decisively pressed in the direction of making determinative not the special significance of the realm of life regulated, but the felt seriousness of the intrusion of the state. After cataloguing various decisions dealing with privacy problems, the Court simply held that the right to privacy was "broad enough to encompass the woman's decision whether or not to terminate her pregnancy."[98] In elaborating, the Court described the degree of *detriment* suffered by a woman when she is denied free choice in this field.[99]

What remains, then, is the view that any government action which imposes severe detriment on the individual falls within the right to privacy. It seems implausible, however, that the Court meant to go that far, and perhaps the catalogue of cases that precedes the Court's discussion[100] is intended to set the rough limits on the spheres of privacy within which severe detriment will invoke constitutional protection. In

94. *Id.* at 453 (emphasis in original).

95. 394 U.S. 557 (1969).

96. *Id.* at 565.

97. 410 U.S. 113 (1973).

98. *Id.* at 153.

99. *Id.*

100. *Id.* at 152-53. The Court cited cases in notes 101-06 *infra* and the following: Stanley v. Georgia, 394 U.S. 557 (1969) (First Amendment); Terry v. Ohio, 392 U.S. 1 (1968) (Fourth Amendment); Katz v. United States, 389 U.S. 347 (1967) (Fourth Amendment); Griswold v. Connecticut, 381 U.S. 479 (1965) ("penumbra" of the Bill of Rights); Boyd v. United States, 116 U.S. 616 (1886) (Fourth and Fifth Amendments). On the significance of this list, compare Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U. L. REV. 765 (1973) with Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).

any case, substantive analysis as to why detriments of this sort are to be taken more seriously than others of equal degree is completely lacking. Privacy is equated either with cases of serious personal detriment from governmental regulation[101] or with a list of activities and relationships including marriage,[102] procreation,[103] contraception,[104] religion,[105] and the education of children,[106] without further elaboration.

The character of the *Roe* approach becomes more clear when considered as a parallel to the reasonable expectation theory. Just as the reasonable expectation approach focuses on the pain of having expectations disappointed, so the *Roe* opinion focuses on the pain of suffering hardships that the government, by its regulation, denies us the opportunity to avoid. The limitations placed on the privacy idea relate to the reasonable expectation analysis: Only those whose actions are within the orbit of current community moral standards are to be protected.[107] What is missing from both approaches is any concern for the distinctive values that are at stake when privacy is intruded upon.

II. The Right to Privacy in California

A. Origins of the Right to Privacy

As noted above,[108] California has an explicit constitutional, inalienable right to privacy and, therefore, need not depend on any United States Supreme Court's interpretation of that right. The history of the judicial elaboration of California's constitutional privacy right begins with decision by the California Supreme Court in *White v. Davis*.[109] *White* involved an action by a professor at the University of California against the Los Angeles Police Department, charging that his classes had been subjected to surveillance by the police and asking for injunctive relief restraining such action in the future.[110] The trial court sustained a demurrer to the complaint, but the supreme court reversed,

101. Griswold v. Connecticut, 381 U.S. 479 (1965).
102. Loving v. Virginia, 388 U.S. 1 (1967).
103. Skinner v. Oklahoma, 316 U.S. 535 (1942).
104. Eisenstadt v. Baird, 405 U.S. 438 (1972).
105. Prince v. Massachusetts, 321 U.S. 158 (1944).
106. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
107. This point was made in Justice Goldberg's opinion in *Griswold*, 381 U.S. at 499 (quoting Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)) and acted upon in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (denying the right of sexual privacy for homosexual acts), *aff'd mem.*, 425 U.S. 901 (1976).
108. *See* note 8 and accompanying text *supra*.
109. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).
110. *Id.* at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97.

maintaining, among other things, that the action constituted a "prima facie violation of the state constitutional right of privacy."[111]

This conclusion was founded exclusively on reference to the argument made by the successful proponents of a constitutional amendment to include privacy among the rights explicitly protected by the California Constitution. The argument was included in the official voter pamphlet distributed to the public when the amendment was on the ballot.[112] That argument focused on the evils of growing government surveillance and the compiling of dossiers on individuals by both government and business. The court declared these evils to be the "moving force behind the new constitutional provision."[113] The court went on to find in the practice of surveillance on university classes a case of "government snooping" in its clearest form for the purpose of making up "police dossiers."[114] Thus, the allegations stated a "prima facie" violation of the right to privacy, which could be met at trial either by showing that the facts were not as alleged or by establishing that the surveillance was justified by compelling state interests.[115]

Just how much is to be made of the analysis presented here? It is brief and casually reasoned, and perhaps is intended to do no more than suggest the character of the argument to be made in the trial court on remand. As an analysis of the constitutional privacy right, however, the court's reasoning is strikingly devoid of reasonable expectation analysis, moving directly from identifying the surveillance as "government snooping" to requiring a compelling state interest to justify such action.

By relying on the voter pamphlet argument, which says that the right to privacy should not be invaded unless the invasion is justified by "compelling public need,"[116] the court seems to interpret the amendment as prohibiting "government snooping" in future cases, and reads this case to be at the very core of the prohibition because the picture painted by the allegations in the complaint "epitomizes the kind of governmental conduct which the new constitutional amendment condemns."[117] The problems raised by this analysis of a constitutional amendment which takes the language of the voter pamphlet as authority for the decision of cases, as if that language had been incorporated

111. *Id.* at 776, 533 P.2d at 234, 120 Cal. Rptr. at 106.
112. *Id.* at 774-75, 533 P.2d at 233-34, 120 Cal. Rptr. at 105-06.
113. *Id.* at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.
114. *Id.* at 775-76, 533 P.2d at 234, 120 Cal. Rptr. at 106.
115. *Id.* at 776, 533 P.2d at 234-35, 120 Cal. Rptr. at 106-07.
116. *Id.* at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.
117. *Id.*

into the constitution, are discussed later.[118] What is significant for present purposes is that no mention is made of "reasonable expectation." Indeed, the focus is not on the individual whose right is violated, but on the evil character of the government activity.[119]

This focus on the government in *White* may be attributed to the fact that it was a taxpayer's suit challenging illegal police conduct.[120] The assumption is that taxpayers have a right not to have their money used illegally, and the court deemed the "snooping" and gathering of dossiers without compelling justification to be illegal action. The conceptual difficulty here is that the action is illegal because it violates the inalienable right to privacy.[121] By reading the voter pamphlet language into the amendment, the court ignored the fact that the only sort of conduct declared illegal by the amendment itself is the violation of a right. If the police conduct is wrongful as judged by the standard of the amendment it must be because it violates the rights of privacy of particular people. A more adequate concept of those rights is essential to elaboration of that standard.

Since *White*, the California Supreme Court has followed an uncertain but increasingly promising course in developing the right to privacy. In *People v. Privitera*,[122] the court limited the right of privacy to protecting us from the "government snooping" which had been the principle concern of the court in *White*. *Privitera* involved the constitutionality of a ban on laetrile, and the court dealt with the issue of privacy protection by asking whether or not the voters, by amending the constitution, intended to create "a right of access to drugs of unproven efficacy."[123] Of course, to ask such a question is to answer it. The court perused the voter pamphlet and found no evidence of an intention to "protect conduct of the sort engaged in by defendants."[124] In effect, then, it read the constitutional language, not as declaring the existence of an inalienable right to privacy for Californians, a right to be given whatever protection is necessary to maintain it, but as specifically prohibiting surveillance and data collection by government and business. Preferring the language of the pamphlet to the language actually adopted by the people, the court read the amendment as if it were a

118. *See* text accompanying notes 125-28 *infra*.
119. White v. Davis, 13 Cal. 3d at 775-76, 533 P.2d at 234, 120 Cal. Rptr. at 105.
120. *Id.* at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97.
121. *See id.* at 773, 533 P.2d at 233, 120 Cal. Rptr. at 105.
122. 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431, *cert. denied*, 444 U.S. 949 (1979).
123. *Id.* at 709, 591 P.2d at 926, 153 Cal. Rptr. at 438.
124. *Id.* at 709-10, 591 P.2d at 926, 153 Cal. Rptr. at 438.

statutory prohibition rather than the simple and majestic statement of a fundamental constitutional right.[125]

In so doing, the court chose to ignore the material in the voter pamphlet that described the right as: "[T]he right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose."[126] In this language, the sponsors of the amendment show that they understood a distinction of which the majority opinion is innocent: the distinction between a fundamental human right and the particular limitations on government conduct that are necessary to protect it. The voter pamphlet speaks of the right in affirmative terms, broadly describing those aspects of our lives entailed in the requirement that privacy be respected. To say that we have a privacy right in this sense is to say that the integrity of these aspects of our lives demands respect.

The voter pamphlet rhetorically refers to what the sponsors of the amendment obviously regarded as the main immediate threat to that integrity: snooping and data collection by government and business.[127] It was natural for the sponsors to appeal to the voters on the basis of what they understood to be an imminent threat of great popular concern. To limit the scope of the amendment to that specific threat, however, would be like limiting the First Amendment to seditious libel as known in the eighteenth century, and the Fourth Amendment to writs of assistance issued for the purpose of enforcing smuggling laws.

Elaboration of the specific standards that would ensure respect for our private lives should include protections from snooping and excessive data collection, but they should include more than that. The court apparently had forgotten that it was construing a constitution, an instrument designed to develop and grow over time. Limiting the language of a constitutional amendment to the specific problem which may have given rise to it leads to a bill of rights that is no more than a disparate collection of solutions to particular historically bound problems, but that is not our constitutional tradition. The tradition within which the voters surely knew themselves to be operating when

125. *See id.* at 740-41, 591 P.2d at 946, 153 Cal. Rptr. at 458 (Newman, J., dissenting). *See also* People v. Davis, 92 Cal. App. 3d 250, 154 Cal. Rptr. 817 (1979) (*Privitera* applied as basis for rejecting argument that the right to privacy protects cocaine use).

126. CALIFORNIA SECRETARY OF STATE, PROPOSED AMENDMENTS TO CONSTITUTION 27 (Nov. 7, 1972) [hereinafter cited as California Voter Pamphlet], *quoted in* White v. Davis, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.

127. California Voter Pamphlet, *supra* note 126, at 27, *quoted in* White v. Davis, 13 Cal. 3d at 774-75, 533 P.2d at 234, 120 Cal. Rptr. at 106.

they amended the California Bill of Rights is one that takes rights broadly and regards them as living concepts, capable of growth and development over time. Thus, this body of rights is to be understood, not merely as an arbitrary historical production, but rather as a general view of what people are and how they ought to relate to one another, a view that is to be worked out in detail by the courts in a case-by-case effort to achieve a coherent practical embodiment of a philosophy of man. It would take Professor Dworkin's imaginary Hercules[128] to live up fully to this lofty conception of constitutional adjudication. Nevertheless, the California Supreme Court should not preclude itself, as it nearly did in *Privitera*, from *trying* to achieve the ideal of a coherent view of privacy.

B. Need for a Comprehensive Definition of Privacy

Happily, the court's apparent effort not to develop the right to privacy in *Privitera* has been abandoned. The court has not overruled *Privitera*, but has simply ignored it in two recent and important cases: *City of Santa Barbara v. Adamson*[129] and *Committee to Defend Reproductive Rights v. Myers*.[130] The decisions in these cases firmly establish that the California constitutional right to privacy *does* protect private activity from interference.[131] These cases open the way for a comprehensive approach; however, they offer strikingly little analysis.

This is particularly true of *Adamson*, in which appellants challenged a residential zoning ordinance that limited the number of unrelated people who could live in a house.[132] After citing *White v. Davis* for the breadth of the privacy right, the court, as it had in *White*, looked to the voter pamphlet argument for guidance as to just what the right encompassed. Relying on a statement in the pamphlet to the effect that the right to privacy protects "one's home,"[133] Justice Newman stated that the "question now is whether that right [to privacy] comprehends the right to live with whomever one wishes, or, at least, to live in an alternative family with persons not related by blood, marriage, or

128. R. DWORKIN, TAKING RIGHTS SERIOUSLY 105 (1978).

129. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

130. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

131. Justice Richardson, who wrote the majority opinion in *Privitera*, joined Justice Manuel's dissent in *Adamson*, 27 Cal. 3d at 138, 610 P.2d at 444, 164 Cal. Rptr. at 547, and wrote a dissenting opinion in *Myers*, 29 Cal. 3d at 297, 625 P.2d at 806, 172 Cal. Rptr. at 893.

132. 27 Cal. 3d at 126-28, 610 P.2d at 437-38, 164 Cal. Rptr. at 540-41.

133. *Id.* at 129-30, 610 P.2d at 439, 164 Cal. Rptr. at 542. The assertion is supported by a footnote citing the Universal Declaration of Human Rights. *Id.* at 130 n.2, 610 P.2d at 439 n.2, 164 Cal. Rptr. at 542 n.2.

adoption."[134] Naturally, after this question is asked, one expects that the nature of the privacy right will be explored further. Instead Justice Newman supports his decision only by quoting from Justice Marshall's dissent in *Village of Belle Terre v. Boraas*:[135]

> The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.[136]

This section of Newman's opinion then ends abruptly, and he next asks whether or not the ordinance's incursion into privacy could be justified by a compelling state interest.[137]

As is characteristic of opinions involving the right to privacy, positive articulation of the right is entirely missing from the analysis. Perhaps the point of these opinions is that the right can be invoked whenever the regulation falls within one of the categories generally associated with the right, and any careful analysis is reserved for the discussion of the countervailing governmental interest. Certainly, this is the pattern set by Justice Blackmun in *Roe v. Wade*.[138] The result, however, is that the crucial issue of the value structure supporting an assertion of the right to privacy is never adequately explored.

The *Myers* opinion offers a little more. The case involved the right to public funding for abortions.[139] Because it has become so well-established that the abortion choice is a part of the right to privacy, the court may have felt little need to develop the point further. What it did, again characteristically, was to present a catalogue of concerns that places abortion within the general realm of the right to privacy. The court said that abortion impacts on the woman's health; falls within the area of marriage, family, and sex; involves the woman's control over her body; and involves the choice of whether or not to have a child, a choice which affects the woman's "control of her social role and personal destiny."[140]

These concerns are all connected with privacy, and the emphasis on establishing such a connection certainly raises the discussion above

134. *Id.* at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542-43.
135. 416 U.S. 1 (1974) (similar ordinance held not to violate Federal Constitution).
136. *Id.* at 16, *quoted in* City of Santa Barbara v. Adamson, 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.
137. *Id.* at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.
138. 410 U.S. 113 (1973).
139. 29 Cal. 3d at 284-85, 625 P.2d at 798, 172 Cal. Rptr. at 884.
140. *Id.* at 274-75, 625 P.2d at 792, 172 Cal. Rptr. at 879.

the level achieved in *Roe v. Wade*. What is still lacking, however, is any systematization of these various elements into a coherent structure necessary to generate the reasoning needed to decide cases in other areas as they arise. Why, for example, was the claim of the right to use laetrile in *Privitera* rejected? Whether or not to use laetrile is a decision involving health, control of one's body, and control of personal destiny. Is this not part of the right of privacy?[141] That it is not in the area of marriage, family, and sex, is not a sufficient answer. This is not to say that laetrile use *is* part of the right to privacy, but simply to say that the sort of argument used by the courts offers no reasoned basis for deciding one way or the other.

Whatever the California Supreme Court's failure in articulating an explicit general theory of privacy, however, they deserve praise for their development of a comprehensive approach to privacy in the informational sphere: An approach which displays an awareness that the development of informational privacy rights must rest on a more general conception of what is particularly private in life and what is not. In a series of cases the courts have extended the privacy right protection to include the records of everyday transactions in the hands of large bureaucratic institutions. In *Burrows v. Superior Court*,[142] the question was whether or not the police could obtain Burrows' bank statements from his bank without a warrant. The court held that they could not because a "bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes."[143] In *People v. McKunes*,[144] the same approach was applied to the ability of the police to obtain records of telephone calls from the telephone company without legal process. In *People v. Blair*,[145] obtaining records of credit card charges from a credit card company was given the same treatment.

Although the reasoning purports to be that of reasonable expectation, in each case the California Supreme Court reaches a different conclusion than the one reached by the United States Supreme Court as to

141. Such an argument was made by the court of appeals in People v. Privitera, 141 Cal. Rptr. 764 (Ct. App. 1977) (upholding Dr. Privitera's right to use laetrile) *rev'd*, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (1979), *reprinted in* People v. Privitera, 23 Cal. 3d at 712-40, 591 P.2d at 927-46, 153 Cal Rptr. at 439-58 (Bird, C.J., dissenting). *See also* Aden v. Younger, 57 Cal. App. 3d 662, 124 Cal. Rptr. 126 (1976) (striking down limits on the use of electroshock therapy on a willing patient).

142. 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

143. *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.

144. 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975).

145. 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979).

just what people expect from these bureaucracies.[146] What the California court finds to be crucial is that records kept by these bureaucracies reveal "many aspects of personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography."[147] It is clear that the focus is not on expectation of privacy, but on the extent to which free access to these records would destroy the capacity of the individual to have a private life.

It is apparent, in other cases as well, that the California courts have imported a concern for protecting the substance of private life into the reasonable expectation theory. This is true, for example, of a series of cases involving police observation of marijuana cultivation.[148] The language of reasonable expectation is used, and, for purposes of aerial observation, the line is drawn between the backyard marijuana garden and the marijuana patch in the wilds: the first cannot be subjected to aerial surveillance; the second can.[149] The reasoning is rather strained. A backyard, we are told, is a place "expectedly private according to the common habits of mankind," and one who builds a swimming pool in his yard "expects privacy . . . from aerial inspection."[150] Not so, however, with agricultural lands—such an expectation of privacy is "not consistent with the common habits of mankind in the use of agricultural and woodland areas."[151] It is implausible to think that there are any "common habits of mankind" with regard to observation by overflight. In terms of risk analysis, any outdoor cultivation would be vulnerable; only indoor cultivation would be a suffi-

146. The United States Supreme Court's judgments as to what privacy bank and telephone customers reasonably expect are found in Smith v. Maryland, 442 U.S. 735 (1979) (pen register on phone held not to be a "search") and United States v. Miller, 425 U.S. 435 (1976) (no Fourth Amendment interest in copies of checks and bank records after issuance of subpoena).

147. Burrows v. Superior Court, 13 Cal. 3d at 247, 529 P.2d at 597, 118 Cal. Rptr. at 173.

148. People v. Lovelace, 116 Cal. App. 3d 541, 172 Cal. Rptr. 65 (1981) (plain view observation of marijuana plants in defendant's backyard through cracks in surrounding fence and from a vantage point not expected to be used by public at large held to be an unreasonable search); Burkholder v. Superior Court, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979) (search conducted by aircraft from elevation of 1500 feet aided by binoculars not unreasonable, but a reasonable expectation of privacy protected petitioner from subsequent entry into posted "no trespassing" area without a warrant); Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973) (search conducted by low-flying airplane and later viewing from a place where expectations of privacy had not been exhibited held not to violate Fourth Amendment); People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973) (search conducted from a helicopter after it was determined that nothing could be seen from the road held illegal without a warrant).

149. Dean v. Superior Court, 35 Cal. App. 3d 112, 116-17, 110 Cal. Rptr. 585, 589 (1973).

150. *Id.* at 117, 110 Cal. Rptr. at 589.

151. *Id.* at 118, 110 Cal. Rptr. at 590.

cient precaution to justify an expectation of privacy as reasonable. Certainly, a remote woodland spot is less vulnerable than an urban backyard. What is apparent to everyone, however, is that a backyard is a place which is an integral part of private life in our society, while agricultural lands are not.

The case that shows the greatest strain with regard to the reasonable expectation theory is the recent decision in *People v. Lovelace*.[152] In this case the plants were seen by a policeman looking through gaps in a fence from an alley.[153] The court made much of the fact that Lovelace had recently repaired his fence to make it less easy to see through: "The repair of the six-foot-high fence demonstrated that it was objectively reasonable for appellant and his family to entertain such a subjective expectation of privacy."[154] The problem is that the gaps the officer looked through, though small, remained in spite of the repairs.[155] Was not the risk that a policeman might look through the knothole at least as great as the risk that one of Hoffa's co-conspirators would be an undercover agent?[156] The answer seems to be that such talk about the common habits and reasonable expectation are a vehicle for the justices' individual judgments that backyards ought to be off-limits.

The same can be said of the trash can declared off-limits in *People v. Krivda*[157] and of the doorless toilet stalls in *People v. Triggs*.[158] In both cases, it is clear that the court was impressed by the extent to which intrusions cut into private life. Trash identified as belonging to a particular house can reveal a great deal about the life that goes on within;[159] "private parts and bodily functions"[160] are felt by all of us to be intensely private.

If the reasonable expectation approach can be used as a vehicle for such values, however, it may also be used to hamper their realization. For example, the protection of *Krivda* can be undone in cases where fellow tenants or neighbors share trash cans, although the contents of the can could be, in such cases, just as revealing as in *Krivda* itself.[161]

152. 116 Cal. App. 3d 541, 172 Cal. Rptr. 65 (1981).
153. *Id.* at 545, 172 Cal. Rptr. at 67.
154. *Id.* at 550, 172 Cal. Rptr. at 70.
155. *Id.* at 551, 172 Cal. Rptr. at 70.
156. *See* note 71 and accompanying text *supra*.
157. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).
158. 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973).
159. 5 Cal. 3d at 366, 486 P.2d at 1268, 96 Cal. Rptr. at 68.
160. 8 Cal. 3d at 893, 506 P.2d at 238, 106 Cal. Rptr. at 414.
161. *See* People v. Stewart, 34 Cal. App. 3d 695, 110 Cal. Rptr. 227 (1973) (search of trash upheld because deposited in apartment house trash can used in common by tenants);

Similarly, the court held in *People v. Blair*[162] that the telephone records, which would have been inadmissible if they had been seized in California, are admissible in California courts because they were seized in Pennsylvania. Blair had no reasonable expectation of privacy in Philadelphia that was violated by the seizure: "Since the search was legal there, his expectation of privacy was not impaired under the laws of the state in which he resided."[163] This does not change the fact, however, that the telephone records provide "a virtual current biography"[164] and therefore subject the individual to a serious diminution in privacy. If the disappointment of expectations is the true core of privacy inquiry, then it follows that the law of Pennsylvania, or any other state, can define one's expectations, and therefore, one's right of privacy. Surely, a superior definition of privacy is in order.

C. Toward Abandonment of the Reasonable Expectation Theory: The Privacy of the Pretrial Detainee

Two recent California court of appeal decisions have taken the next crucial step: to free the right to privacy from the reasonable expectation theory. In *People v. Maxie*[165] and *De Lancie v. Superior Court*,[166] there is the possibility that substantive privacy analysis may emerge from behind the screen of "reasonable expectation."

De Lancie involved a taxpayers' suit challenging the constitutionality of a concealed system of allegedly indiscriminate electronic eaves-

People v. Superior Court (Barrett), 23 Cal. App. 3d 1004, 100 Cal. Rptr. 604 (1972) (search of trash upheld because it had been placed in neighbor's trash can, though neighbor consented).

162. 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979).

163. *Id.* at 656, 602 P.2d at 748, 159 Cal. Rptr. at 828. The records were seized by federal agents in Pennsylvania. *Id.* at 654, 602 P.2d at 747, 159 Cal. Rptr. at 827. The court assumed that they would have been admissible under federal and Pennsylvania law. While federal law under Smith v. Maryland, 442 U.S. 735 (1979), would clearly legalize the seizure, the court cited no Pennsylvania law that would establish its legality. In fact, as Pennsylvania had recently adopted the California *Burrows* approach to bank records in Commonwealth v. De John, 486 Pa. 32, 403 A.2d 1283 (1979), it seems at least as reasonable to say that Pennsylvania law would support an expectation of privacy in telephone records. Would one have a different expectation of privacy in relation to federal agents than in relation to state agents in such a situation?

164. *See* text accompanying note 147 *supra*.

165. 165 Cal. Rptr. 4 (Ct. App. 1980), *hearing granted*, Crim. No. 21556 (Sup. Ct. July 16, 1980). *See* note 9 *supra*, concerning the effect of the California Supreme Court granting a hearing.

166. 159 Cal. Rptr. 20 (Ct. App. 1979), *hearing granted*, S.F. No. 24095 (Sup. Ct. Nov. 29, 1979), *argument*, (Sup. Ct. Aug. 5, 1981). *See* note 9 *supra* concerning the effect of the California Supreme Court granting a hearing.

dropping on visits with pretrial detainees.[167] In an appeal from an order sustaining a demurrer to the complaint, the court of appeal determined that the plaintiffs had stated a valid cause of action under the privacy clause of the California Constitution. In remanding the case, the appellate court pointed out that it would be interested in hearing the prison officials' explanation of why the violation of privacy was justified by a "compelling governmental necessity," but stated that it could not, "*without more*," conceive of any justification for this practice.[168]

In *Maxie*, the question was whether or not evidence derived from covert electronic monitoring of a conversation during a visit with a pretrial detainee could be used against the *visitor*.[169] The appellate court found that the surveillance did infringe upon the visitor's right to privacy and that therefore the evidence should have been suppressed under the privacy clause unless a compelling governmental interest in surveillance could be shown.[170] *De Lancie* and *Maxie* are currently pending before the California Supreme Court.[171]

A long series of cases before *Maxie* has held that the privacy rights of prisoners and pretrial detainees are not violated when their communications with each other or with visitors are monitored by prison authorities.[172] The center of the analysis is, of course, the reasonable expectation of privacy.[173] Because those who are incarcerated cannot reasonably expect any privacy—surveillance being "the order of the day"[174]—their right to privacy could not be violated; they had no reasonable expectations to disappoint. Whether or not they subjectively expected their conversations to be private, reasonable persons, in-

167. 159 Cal. Rptr. at 22.

168. *Id.* at 27.

169. 165 Cal. Rptr. at 5.

170. *Id.* at 10.

171. *See* note 9 *supra* for a discussion of the procedural status of the cases pending before the California Supreme Court.

172. *See, e.g.*, People v. Suttle, 90 Cal. App. 3d 572, 153 Cal. Rptr. 409 (1979) (no reasonable expectation of privacy while in jail cell); People v. Santos, 26 Cal. App. 3d 397, 102 Cal. Rptr. 678 (1972) (electronic surveillance of conversation over intercom telephone in jail not illegal); People v. Boulad, 235 Cal. App. 2d 119, 45 Cal. Rptr. 104 (1965) (recording of conversation between defendant and person in adjoining cell admissible), *cert. denied*, 383 U.S. 915 (1966). *Cf.* People v. Case, 105 Cal. App. 3d 826, 164 Cal. Rptr. 662 (1980) (no expectation of privacy while in booking cage at jail); People v. Newton, 42 Cal. App. 3d 292, 116 Cal. Rptr. 690 (1974) (no reasonable expectation of privacy while arrested and in patrol car).

173. *See, e.g.*, People v. Case, 105 Cal. App. 826, 835, 164 Cal. Rptr. 662, 667 (1980); People v. Suttle, 90 Cal. App. 3d 572, 578-79, 153 Cal. Rptr. 409, 413-14 (1980).

174. Lanza v. New York, 370 U.S. 139, 143 (1962), *quoted in In re* Joseph A., 30 Cal. App. 3d 880, 884, 106 Cal. Rptr. 729, 732 (1973).

formed about the nature of prisons and jails, would know that surveillance is pervasive. Only when the officials actually make representations, contrary to those normal expectations will a detainee's conversations in a particular case will be private, and it can be said that surveillance results in the kind of injury that violates the right to privacy.[175]

Although this reasoning was sufficient to justify rejection of the claims on "reasonable expectation of privacy" grounds, these two cases rejected the reasonable expectation theory itself using California's own constitutional right to privacy as applied in *White v. Davis*.[176] The court in *Maxie* suggested that to require the individual to show a reasonable expectation of privacy is to shift the burden of proof from the prosecution in a way that violates constitutional values;[177] the court in *De Lancie* stated that the reasonable expectation limitation simply has no place in interpreting the California constitutional protection.[178] Unfortunately, neither decision specified the ambit or character of the right to privacy beyond that which can be gained from the facts of the cases and from the statement in *De Lancie* that "[p]robably few other human experiences evoke a greater need to engage in private communications with family and friends on a most intimate and personal level."[179] This sentiment suggests that it is the character of the need for privacy, rather than the expectation of it, that justifies its protection, and further, that privacy has to do with intimate relationships. It is clear that both courts regarded the violation of privacy in these cases as too obvious to adumbrate. Justice Elkington, dissenting in *De Lancie*, however, was apparently baffled by the notion that privacy rights could exist in the absence of any reasonable expectations.[180] What is needed, if these decisions are to stand, is a more extensive articulation of just what is involved in a violation of the right to privacy if it is not the disappointment of an expectation. The following section proposes a formulation that is derived from an emerging theme of the privacy in these California privacy right cases: The protection of private life.

175. This exception was established in North v. Superior Court, 8 Cal. 3d 301, 311, 502 P.2d 1305, 1311, 104 Cal. Rptr. 833, 839 (1972).

176. *See* text accompanying notes 109-22 *supra*.

177. 105 Cal. App. 3d at 915, 165 Cal. Rptr. at 10.

178. 159 Cal. Rptr. at 25-26.

179. *Id.* at 27.

180. *Id.* at 28-29.

III. The Right to Have a Private Life: A Proposal

A. Definition of Private Life

Attempts to define the right to privacy are numerous and many have added greatly to our understanding of the concept.[181] It is suggested, however, that they all err in one significant respect: They try to define the term privacy. Such attempts assume that the idea of privacy can be grasped, and that the right to privacy is the right to have privacy protected. These attempts try to develop a brief and easily applicable formula that will delimit the idea of privacy.[182]

The difficulty with this effort is that there is no clear substantive concept lying behind the word "privacy" that can readily be subjected to this sort of formulation. This is not to say that the idea of privacy is without content, but that the term denominates a range of overlapping situations. The multifaceted nature of privacy is part of the reason for both the diversity of the formulas and for the appeal of the reductionist views, which insist either that the right to privacy is nothing more than a loose collection of various rights[183] or that it protects nothing which is not already protected by other rights.[184]

Neither privacy nor the right to privacy can be reduced to a formula; nevertheless, the right to privacy is a coherent idea with an indispensible role to play. This is because it involves the protection of a particular realm of life: the private life.[185] It is rich and various, not only because this realm of life takes in a very broad range of activities and states, but also because it involves a variety of kinds of protections. In Hohfeldian terms,[186] the right to privacy is a collection of discrete rights that are held together by the fact that they are parts of what it takes to protect the private life. All are human rights which we have

181. Among the major contributions are D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY (1979); Fried, *Privacy*, 77 YALE L.J. 475 (1968); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Gerety, *supra* note 2, at 237; Gross, *Privacy and Autonomy*, in NOMOS, *supra* note 79, at 169; Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

182. Thus, Gerety seeks to identify the "necessary and sufficient conditions for any application of the concept," Gerety, *supra* note 2, at 235.

183. Prosser, *supra* note 11, at 389.

184. Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

185. The European approach is to focus on private life rather than privacy. For example, the European Convention declares that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." European Convention on Human Rights, Nov. 4, 1950 at art. 8, para. 1, 213 U.N.T.S. 221. *See generally* PRIVACY AND HUMAN RIGHTS (A. Robertson ed. 1973).

186. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923).

because we have a right to privacy—a right to have a private life—which is worthy of respect.[187]

This conception of the right to privacy does not by any means take into account all cases in which people would say that they want something to be private. On the contrary, part of the strength of this view is that, in taking the position that the "right to privacy" is a conception to be explicated by means other than the definition of the word "privacy," it is a view that frees us from the need to deal with every use of the term "privacy" in ordinary language, and allows us to concentrate on those cases in which the *right* to privacy protects a value special to it.

What is the idea of the private life? It is a commonly shared conception of those aspects of our lives that we identify most immediately with ourselves—those aspects that are not subject to the strictures of formal roles and that *could not* be subjected to them.[188] Specifically, these are aspects of life that *could not exist* under such strictures. To subject them to these constraints would be to destroy that which gives them their most significant quality.

This is not to say that people could not do the things which make up the content of these aspects of life even under restriction or surveillance, but that they would lose their defining characteristics under those circumstances. Nor is this true only in the trivial sense that something is not private when it is observed by, or controlled by, the public. Certainly it is true in one not very interesting sense that walking or chewing gum when no one else is present are private activities, and that when someone else comes on the scene they cease to be so. But it is characteristic, indeed it is the crucial characteristic, of the activities and conditions of which I am thinking that they be private.

For example, intimacy cannot exist except in privacy. Intimacy involves a consciousness that precludes an awareness of the presence of outsiders; experiences which might be experiences of intimacy simply cannot be when we are made conscious of the presence of "others."[189] So too, friendship ceases to be friendship when its conditions are im-

187. On the other hand, Prosser's catalogue includes rights that arise from another source and are connected with each other only in that they all protect against injuries that fall somewhere within the broad range of the phrase "to be let alone." Prosser, *supra* note 11, at 389.

188. *See* Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978); *see also* Gavison, *supra* note 181, at 443 ("Some human activities only make sense if there is some privacy").

189. *See* Gerety, *supra* note 2, at 268; Gerstein, *supra* note 188. Gerety gives intimacy a sufficiently broad definition to embody the whole of what I have described as the private life, but his definition, "the consciousness of the mind in its access to its own and other bodies and minds, insofar, at least, as these are generally or specifically secluded from the access of the uninvited," Gerety, *supra* note 2, at 268, seems too indeterminate to be very helpful, though it does suggest the kind of experience connected with the private life.

posed upon us rather than arising spontaneously. This is not to say that we could not become friends with those who are imposed upon us, but rather that the process of becoming friends itself cannot be imposed. If a situation can be described as one in which friendship is imposed and regulated, it is not really friendship but a kind of imitation that lacks the crucial characteristics of the real thing. The same can be said of love, and, more broadly, of such aspects of human life as self-discovery and creativity.

It also follows that not every action which has an impact on the realm of private life is an invasion of the privacy right. To talk about an activity or a place as private does not mean that no aspect of it can ever be limited or regulated. The privacy of the intimate relationship between lovers is not destroyed by the prohibition on their killing or assaulting one another. That is because this prohibition does not destroy the intimate and therefore private character of the relationship.[190] So too, it does not invade the privacy of a vacation trip to regulate the driving of one who is taking the trip. It would destroy its privacy, however, if the destination of the trip and activities on arrival there were predetermined.[191] So it is that the privacy of the home does not mean that nothing connected with inhabiting a home can be regulated, but only that, by-and-large, a home should be regarded as safe from intrusion. If, on the other hand, there is reason to believe that the home is the scene of a crime, or if it is a place in which people are employed,[192] it loses its immunity to that extent. Even the body itself is not entirely immune. Our common sense experience tells us that our bodies are not the center of the idea of privacy, and that not every interference with the body is an invasion of privacy.[193]

Certainly, we have a right to bodily integrity, which is the basis for our right to ward off assaults and which requires the government to justify in some manner any physical interference. Such an interference, however, violates the right to privacy only to the extent that it is by

190. So it is plausible to distinguish between searches of "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," Griswold v. Connecticut, 381 U.S. 419, 485 (1965), and searches of these same precincts for the telltale signs of violence.

191. Thus the generalized statement that an instrument of travel involves less of an expectation of privacy and therefore less privacy protection, as in Cardwell v. Lewis, 417 U.S. 583, 590 (1974), misses the peculiar characteristics of the structure of private life.

192. *See, e.g.*, Annenberg v. Southern Cal. Dist. Council of Laborers, 38 Cal. App. 3d 637, 647, 113 Cal. Rptr. 519, 526 (1974) (held picketing of a private home by domestic employees allowable because "the household enters in a limited degree into the economic marketplace" and loses its "isolation" when domestics are hired).

193. Parker, *supra* note 181, at 280-81, focuses his notion of privacy on the body, arguing that privacy is "control over who can sense us." *Id.* at 281.

nature an interference with private life. This is true of prohibiting abortion and of any interference with our sexual life.[194] It would also be true of any search of the body that is aimed at disclosing some aspect of private life, or that involves the "private parts," denominated private because the intensity of their connection with our private lives makes any imposed disclosure of them a potential invasion of private life itself.[195] For example, compelling an examination involving the massage of the prostate gland in order to disclose a venereal disease is a clear invasion of privacy.[196] On the other hand, although ordering the removal of bullets from the body of a victim to determine what gun fired them is certainly an invasion of bodily integrity, it is not an invasion of privacy.[197]

It is not only these more significant activities and states which belong to the private life, however. A great deal of private life is made up of things that are in themselves quite trivial, but no less significant for such a life and no less dependent on privacy for their special character. These are the activities of everyday private life: dressing, undressing, washing, eating, reading, and so on. Private life would be severely impoverished if only the central experiences of intimacy and self-discovery were protected, because even these central experiences would wither without protection afforded to these less central moments. That is, one quality of the central experiences is their spontaneous character and their tendency to color and be colored by the less central moments that surround them. A private life that consists only of scheduled periods of intimacy, for example, is clearly grossly impoverished.[198] Not only does it lack the flavor that is given to what most of us know as private life by our capacity to play out the little spontaneities and eccentricities of our daily lives without regulation or surveillance by others, it also loses all that can be gained from being able to enter spontaneously into intimacy or creativity.

194. For discussions of the right to privacy of sexual life and arguments that, contrary to the suggestion of Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976), the right should not be restricted to behavior that is conventionally acceptable, see Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957 (1979).

195. *See* Gerstein, *supra* note 188, at 80. Gerety, *supra* note 2, at 269, writes suggestively of "an intimate body."

196. *See* People v. Scott, 21 Cal. 3d 284, 294, 578 P.2d 123, 128, 145 Cal. Rptr. 876, 881 (1978) (held that this procedure requires especially strong justification because it involves "the most intimate of bodily functions, traditionally and universally regarded as private").

197. *See* People v. Browning, 108 Cal. App. 3d 117, 166 Cal. Rptr. 293 (1980).

198. There is an element of this scheduled intimacy in prison life. *See* text accompanying notes 220-29 *infra*.

This broad miscellany of activity does not consist of a set of specifically enumerable acts that would not retain their character if they were not private. Tying shoes and showering are still tying shoes and showering whether carried on in private or before others. It is clear, however, that these activities and others like them can have a special character as part of a private life, which they lose if they are watched and regulated: A quality of unselfconsciousness that significantly contributes to the secure sense of our own identity which we need in order to have the more profound and significant experiences of privacy spoken of above. Taken together and in context, they are the essence of ordinary private life.

There is no way to give privacy full protection through an enumeration of specifically protected activities and relationships. The particularly important aspects of private life can and should be enumerated and given explicit protection. Beyond this, however, what is needed is a reserve within which the larger organism of private life can be allowed the space to breathe and develop; in short, the home and its equivalents are needed. It is on this reserve that the right to privacy has been traditionally centered, and with good reason.[199] Whether we are owners or occupants or casual visitors, it is essential to the security of private life that those places dedicated to private living remain presumptively secure from intrusion.

B. Why the Private Life Needs Special Protection

One of the crucial points about the right to privacy is that it is not defined in terms of the particular means by which an invasion of privacy might be carried out. The question, therefore, is not whether the government is seeking information about you or attempting to regulate you, but whether whatever the government is trying to do would significantly hamper your capacity to have a full private life.[200]

Just what sort of government interference is forbidden will depend on the particular case. Sexual intimacy is disrupted either by regulation or surveillance. The question with regard to abortion, however, is not whether the operation can be carried on in private, but whether the person involved will retain the capacity to make the autonomous decision to have it or not.

In both cases, the broad goal is the same: To maintain the integrity of our familial and other intimate relationships. The fabric of pri-

199. *See* Note, *supra* note 85, at 180-81.

200. Thus, contrary to Gross, *supra* note 181, at 181, our right to privacy is violated whether the government seeks to "regulate [our] personal affairs . . . [or] get acquainted with them." *See* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

vate life can be destroyed *either* by surveillance *or* control. What the courts have developed as two separate aspects of privacy do, in fact, protect the single entity of private life from these two distinct sources of danger. Resistance to *surveillance* of private life does not have its origin in values separate from those on which resistance to *regulation* of private life is based; the difference arises only from the various ways in which the complex structure of private life can be attacked by government.

It follows, too, that some, but by no means all, assertions of a right to keep information private (which here simply means keeping others from having access to it) are necessarily authentic assertions of the right to privacy. Claims to keep information private may be asserted in order to allow government decisions to be made better[201] or to support the rehabilitative role of punishment.[202] In neither of these cases, however, would the right to privacy be implicated, as it would where the desire is to keep information private in order to maintain the integrity of private life.[203]

It is also a mistake to regard any detriment to our health[204] or to the environment[205] as an invasion of privacy. To do so is to stretch the concept of privacy out of all proportion and to lose touch with the values that it is aimed specifically at protecting—precisely as the Court did

201. *But see* United States v. Nixon, 418 U.S. 683 (1974).

202. *See, e.g.*, Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

203. Although the California courts have not always distinguished those cases in which individuals have a right to keep information private to protect their private lives from those in which such a right is invoked for other purposes, *see, e.g.*, Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), a number of cases manifest a special concern for information about private life. *Compare* People v. Elder, 63 Cal. App. 3d 731, 134 Cal. Rptr. 212 (1976) (acceptable for the police to gain name and address from utilities), *with* Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), People v. McKunes, 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975), People v. Blair, 25 Cal. 3d 640, 602 P.2d 778, 159 Cal. Rptr. 818 (1979) (ruled to be a violation of the right to privacy for the police to get information amounting to a "a virtual current biography" from banks, credit card companies, or utilities). *See also* Gunn v. Employment Dev. Dep't, 94 Cal. App. 3d 658, 156 Cal. Rptr. 584 (1979) (held that it would violate the right to privacy to deny unemployment benefits to a woman who refused to say whether she was pregnant).

204. The court of appeal in *People v. Privitera* had taken this view, finding the right to use laetrile to be a part of the comprehensive right "to be let alone." *See* note 141 and accompanying text. *See also* Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rtpr. 535 (1976) (a violation of the patient's right to privacy by requiring reading of "informed consent" information to a "responsible relative" prior to administering shock treatment to willing and competent mental patients).

205. *See* Van den Haag, *On Privacy*, in NOMOS, *supra* note 79, at 149, 154.

in *Roe v. Wade*.[206] The right to privacy is not aimed at protecting every aspect of the quality of private life, but precisely its *private* character. An uncomfortable private life is still a private life. A life lived under constant observation or regulation is not.

Only when an action inhibits, or is aimed at inhibiting, our capacity to lead a full private life is the right to privacy violated. The right is violated, however, *whenever* this occurs. When the intimacy of friendship is disrupted by surveillance aimed at detecting crime, a part of private life is annihilated. If the state were to try to impose a relationship upon us, for example, in the form of an undercover agent, this assertion of the capacity to control our private lives would be a violation of the privacy right, even if the relationship imposed happened to blossom into genuine intimacy.

The idea of the private life necessarily involves control, the capacity to make choices or act spontaneously without social constraints. This does not mean, however, that the private life can be defined in terms of control or that the right to privacy is simply the right to control access to ourselves in general. That view suggests, counterintuitively, that when we make our private lives known we are exercising the right to privacy by choosing to expose ourselves, and not diminishing the private aspect of our lives at all.[207] The notion would be then that every one of our actions is an exercise of the right to privacy in one direction or the other, and that our public life is simply the consequence of our decisions to exercise that right in a particular way. In this sense, the public aspect of our lives is just as characteristic of, and perhaps more natural to, our lives than is the private, because it is only by establishing limiting rituals that the private realm is constituted as private.[208]

It seems unnecessary and artificial to say that when we appear in public we are exercising the right to privacy. It is more plausible simply to say that the right to privacy is the right to have a private life, and that having a private life involves having a significant measure of choice, both as to when we will retreat from the public realm and how and with whom we will lead our lives in the private realm. This also seems more plausible than the view that privacy is simply the same thing as exclusion, so that solitary confinement and a hermit's life are

206. *See* notes 97-107 and accompanying text *supra*. *See also* Doe v. Bolton, 410 U.S. 179, 197 (1973) ("woman's right to receive medical care in accordance with her licensed physician's best judgment," is part of the right to privacy).

207. This view is held by Gross, *supra* note 181, at 170.

208. *See* Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976).

both equally cases of perfect privacy.[209] Common sense, as reflected in judicial decisions,[210] instead points to the idea of privacy as a matter of living with and among others.

It is only after the general nature of the right to live a private life has been understood that the reasonable expectation issue arises. If there is a question as to whether a person has in fact exposed some aspect of his presumptively private life to the public, or to any others beyond his private sphere, he might respond that the others in fact penetrated his private sphere in spite of the fact that he took reasonable precautions to avoid this. The question then is whether those precautions were reasonable as judged by the common sense of the community.[211]

The primary and central question, therefore, is whether or not a person's opportunity to lead a private life has been interfered with; it is only in responding to the assertion that it has been interfered with that the question of reasonable expectation arises. To treat it otherwise is to misconceive the nature of the injury involved in the violation of the privacy right and to mistake a minor aspect of the right for its core. Some earlier pretrial detainee cases had made this mistake.[212] The court of appeal in *Maxie* was quite right in saying that these earlier decisions have wrongly placed the burden of proof on the defendant by requiring that a reasonable expectation of privacy be shown as the basis of a privacy claim against the government.[213] The question of reasonable expectation should not arise until it has been shown that the individual had the option of maintaining the privacy of his private life. It is a cruel joke to deny a claim that the right to privacy was violated on the basis that the claimant was placed by the government in a position where he could expect them to deny him the minimal respect due his humanity, or in which he would not even develop a sufficient sense of that humanity to challenge such a denial.

Why is private life deserving of a special sort of protection? For one thing, it needs a special sort of protection if it is to continue to exist. Unlike other sorts of activities or states, it literally withers away when brought out into the open or subjected to regulation. Further, it plays a

209. *See* D. O'BRIEN, *supra* note 181, at 15-17; Gavison, *supra* note 181, at 428 ("[A]n individual enjoys *perfect* privacy when he is completely inaccessable to others" (emphasis in original)).

210. *See, e.g.*, cases cited in notes 102-06 *supra*.

211. *See* Note, *supra* note 85, at 168-70.

212. *See* text accompanying notes 172-75 *supra*.

213. *See* People v. Maxie, 165 Cal. Rptr. at 10.

very important role in our lives. It is one of the major constituent elements of individuality.

Our private lives individuate us in two ways. First, because in our private lives we can act spontaneously without regard to the constraints imposed by convention and the judgments of others, we have the greatest opportunity to be different from others. Second, developing these differences in our private lives gives us the individuality we can bring to encounters in public life. If we express ourselves creatively in our work, for example, it is because we have *selves* to express, and the private life is essential to the development of these selves.

In particular, it is in privacy that we are able to develop the resources necessary to be morally autonomous, persons whose moral values are genuinely our own. Without the opportunity to develop moral values in our private lives, we would have little opportunity to go beyond the values embodied in the formal roles we play and in the expectations of those we relate to through them. Moreover, the likelihood is far greater that we would be unable to make judgments other than those required by the conventions of our positions. The capacity to develop a moral point of view which is authentically our own requires the opportunity for reflection, discussion and action, within the sphere of private life.[214]

It is the fragility of private life, and the nature of values that are at stake when it is threatened, which make it so elusive. The spurious appeal of finding that a violation of the right to privacy is just a disappointment of an expectation of privacy is that we can identify the harm as being of a familiar sort, a kind of pain. There is also a misleading tendency to identify some sort of offense or injury to the sensibilities as the element of harm.[215]

While a violation of the privacy right may well injure sensibilities and cause pain, that pain is not the core injury that makes the action a violation of the right to privacy. The core injury is instead the destruction of some aspect of private life, or the denial of some opportunity to live it. It is true that corporations should have no right to privacy,[216]

214. *See* Gerstein, *The Demise of* Boyd: *Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. Rev. 343, 348-49 (1979).

215. *See* City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 268, 466 P.2d 225, 231, 85 Cal. Rptr. 1, 7 (1970) ("the right of privacy concerns one's feelings and one's own peace of mind").

216. Ion Equip. Corp. v. Nelson, 110 Cal. App. 3d 868, 878, 168 Cal. Rptr. 361, 366 (1980) ("A corporation is a fictitious person and has no 'feelings' which may be injured in the sense of the tort").

but this is not just because they lack our sensibilities; it is because they lack all of those capacities that go into having a private life.

Can this view be identified as the one enacted by the people of California into their body of constitutionally protected rights? Certainly there is some reason to believe that this protection of private life is exactly what they believed themselves to be adopting. The idea of the sanctity of private life has a long tradition in the United States,[217] and this tradition forms the foundation for the view taken here. Further, that tradition is alluded to in the argument for the amendment, which quotes Brandeis' well-known reference to the right to privacy as the "right to be let alone."[218] There is also the breadth of the statement that the right protects "our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose."[219] Though loosely stated, this is a fairly complete statement of those aspects of life intuitively connected with private life, either as a part or as arising from it.

California courts have, under cover of the reasonable expectation doctrine, moved a considerable distance toward the view developed here. *Maxie* and *De Lancie* provide an opportunity to throw off the cover.

C. Application of the Private Life Theory: Privacy of the Pretrial Detainee

The reasonable expectation approach denies the existence of a right to privacy in prison.[220] The assumption of universal surveillance not only destroys any basis for claiming a right not to be watched or listened to, it also supports the view that "the penumbral right of privacy enunciated in *Griswold* can have no more application in the setting here involved than could the right to bear arms."[221]

217. *See* D. SEIPP, THE RIGHT OF PRIVACY IN AMERICAN HISTORY (1977).

218. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

219. California Voter Pamphlet, *supra* note 126, at 27.

220. In its most recent pronouncement, in Bell v. Wolfish, 441 U.S. 520, 557-58 (1979), the United States Supreme Court was unwilling either to endorse the classic view of Lanza v. New York, 370 U.S. 139 (1962), or to reject it: "It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person." *Cf.*, *Lanza*, *id.* at 143-44 ("In any case, given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope").

221. People v. Frazier, 256 Cal. App. 2d 630, 631, 64 Cal. Rptr. 447, 447-48 (1967).

The total denial of the right to privacy in prison does at least reflect a perverse awareness of the connection between the two sides of privacy theory. In responding to a recent claim that the *Griswold* right to privacy does not cover sexual activity among prisoners, a court of appeal pointed out that "since appellant's participation in the acts or oral copulation occurred in a 12-man cell of a county jail, he cannot reasonably assert an objective expectation of privacy as to his sexual behavior."[222] Because there was no opportunity for privacy, and therefore no expectation of privacy, the sexual activity cannot be regarded as private and can therefore be prohibited.

The approach suggested here reverses the process. Starting from the premise that everyone has the right to a private life, and that this right ought to be respected, even in prison, the question must be whether or not it is justifiable to imprison people under conditions in which they are wholly denied the opportunity to have private sexual relations. The answer to this question may not be easy to get at. The assertion of a right to sexual privacy in prison comes up against the traditional assertion that constant physical surveillance is essential to prison security. Private life in prison will be restricted severely as compared to private life outside of it, but that fact cannot support the assumption that private life in prison cannot exist. The crucial point is that respect for the right to privacy requires us to give a very strong justification for such a severe narrowing of private life. The assumption must be that the right to privacy is as necessary to people in prison as it is outside of prison. The question is just how private life is to be shaped to a particular context. This puts the right of privacy on a footing with all other rights.[223]

The focus in pretrial detainee cases is on a single limited aspect of private life inside prison, the maintenance of personal relationships with those outside prison. It is clear that the needs of security limit the maintenance of these relationships to the form of a structured visit. Spontaneity of encounter with friends or lovers from outside is precluded by the impossibility of allowing people to come and go freely. There must be a right to such visits, however, at least with those who have an especially close and intimate tie with the prisoner. A Califor-

222. People v. Santibanez, 91 Cal. App. 3d 287, 290, 154 Cal. Rptr. 74, 76 (1979).

223. *See* Giannelli & Gilligan, *Prison Searches and Seizures*, 62 VA. L. REV. 1045, 1074 (1976), contending that "the burden of establishing the existence of institutional interests requiring less Fourth Amendment protection in prison should be carried by the state." The California Penal Code provides that a person imprisoned be deprived "of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the insitution in which he is confined and for the reasonable protection of the public." CAL. PENAL CODE § 2600 (West Supp. 1981).

nia court of appeal recognized this right by holding that visits from children could not be completely prohibited consistent with the constitutional guarantee of privacy.[224] Long-term intimate relationships always have been rightfully at the heart of privacy protection,[225] and it should take a very compelling state objective to justify denying the opportunity to maintain those relationships to those who are in jail awaiting trial.

If there is a right to have visits in order to maintain long-term relationships as a part of private life, the next question is whether and to what extent these visits may be observed by the officials. The starting point must be the assumption that part of the right to have and maintain such relationships is the right to the intimacy which is a very significant part of them. If it is true that intimacy must by its nature be only for those engaged in it, and cannot survive the consciousness of observation, then part of the right to intimacy must be the right not to be observed in intimate situations.[226]

To what extent can this right be realized in the context of imprisonment? There are jurisdictions, including California, in which it is accepted in its amplest form: the conjugal visit.[227] In others it is realized only to the extent that the conversations of the prisoner and the visitor cannot be heard, though they can be visually observed.[228] The recognition of the right to have a private life to the extent that it can be realized under conditions of imprisonment means that the conjugal visit should be regarded as the standard form of visitation, except to the extent that security requirements compel a more restrictive form. It is a crucial aspect of private life that requires a compelling justification for its denial.

Where visual observation of visits has been accepted and it remains only to determine whether electronic eavesdropping on conver-

224. *In re* Smith, 112 Cal. App. 3d 956, 169 Cal. Rptr. 564 (1980). Recognizing the need for security, but recognizing as well the continued existence of the right to maintain the parent-child relationship, the court in *Smith* held that it was up to the jail authorities to formulate "rules and regulations that will reasonably insure safe and secure child visitations." *Id.* at 969, 169 Cal. Rptr. at 570. The California Penal Code declares the right of those incarcerated in state prisons to "have personal visits" under restrictions justified by the needs of security. CAL. PENAL CODE § 2601(d) (West Supp. 1981).

225. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 495, 511 (1977) (Brennan, J., concurring).

226. *See* text accompanying note 189 *supra*.

227. For a discussion of the conjugal visit and the literature relating to it, see Singer, *Privacy, Autonomy, and Dignity in Prison*, 21 BUFFALO L. REV. 669, 707-10 (1972).

228. This was the case in *Maxie*, where the visit was carried on in a room with a window between inmate and visitor and a wall of one-way glass through which guards could observe the visit. 165 Cal. Rptr. at 5.

sations is allowable, the limits of intimacy maintenance have been reached. Intimacy is minimally possible provided that the conversation remains private, but where there is surveillance of conversations it is virtually impossible. If surveillance is openly announced, any sense of intimacy will wither, except for those few capable of blocking the consciousness of the listener from their minds, and even for those people, there is the degradation of knowing that their intimacy is available for the casual scrutiny of others. If the surveillance is clandestine, intimacy is not immediately disrupted, but the participants are being misled about a fundamentally important aspect of their lives. If their conversation becomes intimate, then the violation of their dignity as people is particularly serious. Suppose a situation in which each of us were clandestinely watched by others through all of our private lives. Even if we knew nothing of the watching, our rights would be violated, precisely because we would have been degraded from participants in intimacy to objects of observation. We can all imagine what we would feel if we discovered that this had happened to us, and it is apparent that what is felt on discovery is not only the pain of the recollections of intimacy being contaminated by the new awareness of the watcher, but also indignation at the fact of the observation, a sense that we were wronged by it though we were not aware of it at the time.

The judicial authorization of indiscriminate surveillance of conversations with visitors involves the virtual obliteration of any chance for intimacy between the prisoner and those outside the prison with whom he has long-term relationships. While it has been asserted in general terms that private conversation between prisoner and visitor would not be consistent with the security discipline of the institution,[229] it is not at all clear why this should be so. Surveillance might be justified in a particular case because of information that shows a special need for it.[230] Such surveillance would not violate the right to privacy because appropriate respect is shown to the right when the invasion of private life is justified in terms by which those who suffer should rea-

229. *See* North v. Superior Court, 8 Cal. 3d 301, 308-09, 502 P.2d 1305, 1309, 104 Cal. Rptr. 833, 837 (1972). That the federal system can do without such surveillance is shown by the following comment from the Bureau of Prisons: "Eavesdropping and monitoring of conversations between prisoner and inmate are not condoned by the Bureau." 45 Fed. Reg. 44,228 (1980).

230. In *Maxie*, the court of appeal held that the state must establish "the necessity of this particular intrusion." 165 Cal. Rptr. at 11. The California Department of Corrections requires that the privacy of prison visits between inmates and visitors "will not be imposed upon except as is necessary for the identification of persons, and to maintain order and acceptable conduct, and to prevent the introduction of items, commodities or substances which inmates are not permitted to possess." CAL. ADMIN. CODE tit. 15, R. 3170(f) (1979).

sonably accept. Further, the exceptional and limited character of the invasion leaves the general sense of the security of private communication intact.

Conclusion

The courts of California have done much to give protection to private life in the last decade. What underlies many of their decisions is an appreciation of the inherent value of private life that transcends and ultimately conflicts with the "reasonable expectation" language that is still predominant in their opinions. The pending cases involving surveillance of pretrial detainees present the California Supreme Court with an opportunity to break out of the "reasonable expectation" mold and begin to shape a coherent body of doctrine out of the materials already discernable in their privacy decisions. It is to be hoped that they will take this opportunity to begin to articulate a unified theory for California's right to privacy.[231]

231. Any such work is threatened, however, by the proposal to do away with the California courts' capacity to exercise independent judgment on the exclusion of evidence, now pending before the state legislature. A proposed constitutional amendment that would accomplish this purpose, Senate Constitution Amendment 7, has passed the California Senate and is pending in the State Assembly along with Assembly Bill 1155, which attempts to achieve the same effect by statute, and other similar measures which are likely to be considered by the Assembly Criminal Justice Committee in 1982. California Legislature at Sacramento, 1981-1982 Regular Session, Senate Weekly History, Oct. 6, 1981, pt. 2 at 627; Assembly Weekly History, Oct. 2, 1981, pt. 2, at 602. There is also a proposed initiative measure a provision of which would effectively have the same effect. As of early November 1981, its supporters had collected half of the signatures needed to put the initiative on the ballot. L.A. Daily Journal, Nov. 9, 1981, at 1, col. 1. Such action would again effectively sever the two aspects of the right of privacy from each other, federalizing search and seizure, while leaving the problems of regulation of private life to the state courts.